No. 8129

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS L. EDMONDS, Administrator, Estate of John W. Mitchell, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOUGLAS L. EDMONDS, Administrator, Estate of Adina Mitchell, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONERS.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONERS.

INTRODUCTION.

These are appeals from the decision of the United States Board of Tax Appeals entered July 29, 1935 (R. 199-200) determining that the following deficiencies in Federal income taxes were due and owing from these petitioners:

Douglas L. Edmonds, Administrator of the Estate of John W. Mitchell, Deceased:

A deficiency of $4,048.04 for the calendar year 1924 and a deficiency of $10,241.86 for the period from January 1, 1925 to July 2, 1925 (B. T. A. Docket No. 47516).

Douglas L. Edmonds, Administrator of the Estate of Adina Mitchell, Deceased:

A deficiency of $5,032.09 and a penalty of $1,258.02 for the calendar year 1926; a deficiency of $3,452.89 and a penalty of $863.22 for the calendar year 1927; a deficiency of $4,420.80 and a penalty of $1,105.20 for the calendar year 1928 (B. T. A. Docket No. 66584); a deficiency of $15,084.08 and a penalty of $3,771.02 for the calendar year 1925 (B. T. A. Docket No. 70861).

The only previous opinions in these cases are the opinion of the Board of Tax Appeals (R. 170-178) reported in 31 B. T. A., page 962 and the unpublished memorandum and order of the Board entered on July 9, 1935, denying petitioners' motion for rehearing and reconsideration (R. 196-199).

The cases are brought to this Court by petition for review filed October 18, 1935 (R. 202-223) pursuant to the provisions of sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

PRELIMINARY STATEMENT.

The Commissioner of Internal Revenue based his determination in this case upon the ground that a certain Declaration of Trust executed on April 1, 1924, by the Title Guarantee and Trust Company of Los Angeles, California, created a joint tenancy and that the entire income from the properties held in trust by said Title Guarantee and Trust Company was taxable to Adina Mitchell as surviving joint tenant. The Board of Tax Appeals upheld the Commissioner's determination.

For the sake of clearness a brief statement of certain outstanding facts is necessary before stating the questions involved in this appeal.

John W. Mitchell and Adina Mitchell were married in Los Angeles, California, during the year 1888. By the year 1921 Mr. Mitchell had acquired several parcels of real property which were, during the years 1921 and 1922 conveyed by Mr. Mitchell in trust, to the Title Guarantee and Trust Company of Los Angeles, California, as security for loans to Mr. Mitchell to pay his indebtedness to the Pacific Southwest Trust and Savings Bank of Los Angeles, California, which bank had loaned Mr. Mitchell large sums of money prior to the year 1921.

In the year 1923 Mr. Mitchell authorized the Title Guarantee and Trust Company to sell all of the Cahuenga acreage, title to which was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345,000.00 of which $50,000.00 was paid in cash with a note for $295,000.00,

secured by a deed of trust, evidencing the balance; and the second parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $9,000.00, secured by a deed of trust evidencing the balance. Each of these notes was payable to John W. Mitchell.

The Los Angeles Stone Company also purchased a parcel of real estate for which it gave its note, payable to John W. Mitchell.

As of April 1, 1924, the Title Guarantee and Trust Company held title to all of the real estate previously conveyed to it in trust, except the parcels conveyed to F. A. Hartwell and the Los Angeles Stone Company. Also, as of April 1, 1924, the Title Guarantee and Trust Company held the two notes from Hartwell (payable to John W. Mitchell) as security for loans made by the Title Guarantee and Trust Company to John W. Mitchell.

On April 1, 1924, the Title Guarantee and Trust Company issued a Declaration of Trust, numbered 822-B, declaring that it held certain assets in trust for John W. Mitchell and his wife and confirming and reasserting the assignment to the Title Guarantee and Trust Company of the notes of the Hartwell and Los Angeles Stone Company, as security for the indebtedness of John W. Mitchell to said Title Guarantee and Trust Company.

Upon the death of John W. Mitchell on July 2, 1925, Adina Mitchell was duly appointed executrix of his estate. She filed a Federal Estate tax return for the Estate of John W. Mitchell and included therein

as part of the corpus of said estate, subject to Federal Estate tax, the notes of Mr. Hartwell, payable to John W. Mitchell, the note of the Los Angeles Stone Company, and the value of the real estate held in trust by the Title Guarantee and Trust Company. There was some disagreement between the Commissioner and the executrix as to the amount of estate tax due from the estate of John W. Mitchell; an appeal was taken to the United States Board of Tax Appeals by the executrix, and the matter was finally closed by decision of the Board pursuant to a stipulation executed by the Commissioner and the executrix.

The executrix duly filed a Federal income tax return for the decedent, John W. Mitchell, for the period January 1 to July 2, 1925. The executrix also duly filed a Federal income tax return for the estate of John W. Mitchell for the period from July 2, 1925 to January 1, 1926, and for the calendar years 1926, 1927 and 1928.

The executrix, Adina Mitchell, did not file a personal income tax return for herself for the period of July 2, 1925 to January 1, 1926, or for the years 1926, 1927 and 1928. She regarded the income from the real and personal property held in trust by the Title Guarantee and Trust Company as the income of the Estate of John W. Mitchell, deceased, and did not regard any of such income as her individual property or income.

Without the knowledge or consent of Adina Mitchell, a Deputy Collector at Los Angeles, California, prepared and signed so-called delinquent returns for

Adina Mitchell for the period July 2, 1925 to January 1, 1926 and for the years 1926, 1927 and 1928.

The Commissioner approved the said delinquent returns filed by said Deputy Collector and determined that for the period from January 1 to July 2, 1925, one-half of the income from the real and personal property held in trust by the Title Guarantee and Trust Company constituted the individual taxable income of Adina Mitchell.

The Commissioner further determined that for the period from July 2, 1925 to January 1, 1926, and for the calendar years 1926, 1927 and 1928, all of the income from the real and personal property held in trust by the Title Guarantee and Trust Company constituted the individual income of Adina Mitchell and not the income of the estate of John W. Mitchell.

The Commissioner further determined that the payments during the years 1925, 1926, 1927 and 1928 on the principal of the Hartwell and Los Angeles Stone Company notes constituted income to Adina Mitchell even though the principal of said notes had been included as corpus of the estate of John W. Mitchell, deceased, in the Federal estate tax return of the said estate and Federal estate tax paid thereon by the estate with the aproval of said Commissioner.

The Commissioner further determined that penalties of 25 per cent of the deficiencies proposed should be assessed against Adina Mitchell for the period from July 2, 1925 to January 1, 1926 and for the years 1926, 1927 and 1928, because of her failure to file individual

income tax returns for said years, even though she had, as executrix, filed an estate income tax return for all of said years on the theory that the entire income from the properties in question constituted the income of the estate of John W. Mitchell, deceased, and not the individual income of Adina Mitchell.

QUESTIONS PRESENTED.

I. Whether the Declaration of Trust executed on April 1, 1924, by the Title Guarantee and Trust Company of Los Angeles, California, created a joint tenancy.

II. Whether the income from the real and personal property held in trust by the Title Guarantee and Trust Company of Los Angeles, California, was taxable to John W. Mitchell individually for the period January 1, 1925 to July 2, 1925, and, further, whether the income from said property, both real and personal, after the death of John W. Mitchell on July 2, 1925 was taxable income to the estate of John W. Mitchell or to Adina Mitchell, his surviving joint tenant for the years 1925, 1926, 1927 and 1928.

III. Whether the personal property consisting of the Hartwell notes and the note of the Los Angeles Stone Company, pledged as security for the personal debts of John W. Mitchell was placed in joint tenancy by the said Declaration of Trust, dated April 1, 1924, and whether the said Declaration of Trust was sufficient to create a joint tenancy in the said personal property.

IV. Whether the notes and money here involved constituted corpus of the estate of John W. Mitchell rather than income taxable to Adina Mitchell.

V. The petitioner and the respondent having agreed that the properties here involved constituted corpus of the estate of John W. Mitchell, deceased, and the Board of Tax Appeals under Docket No. 36231 having rendered its decision based thereon, whether the question is res adjudicata, and the Commissioner is estopped from claiming that payments on the principal of said properties is taxable as income to the decedent.

VI. Whether the three promissory notes and the proceeds of the sale of property made after Mr. Mitchell's death can be taxed by the respondent both as corpus of his estate and also income to Adina Mitchell.

VII. Whether if Adina Mitchell is liable for income taxes on these properties the amount of estate tax assessed and paid on the same properties should be allowed as an offset against the income tax liability.

VIII. Whether there is any just and reasonable basis for assessing a penalty against a widow under the circumstances shown in this case.

ASSIGNMENT OF ERRORS.

1. The Board of Tax Appeals erred in holding that as of July 2, 1925, the real and personal property held in trust by the Title Guarantee and Trust Company of

SPECIFICATIONS OF ERRORS.

The Board of Tax Appeals erred in deciding that by a certain declaration of trust executed by John W. Mitchell and Adina Mitchell, title to certain notes and real estate theretofore owned by John W. Mitchell passed to John W. Mitchell and Adina Mitchell, his wife, as joint tenants. (Assignments of Error 1, 3, 4, 5.)

The Board of Tax Appeals erred in deciding that the income realized after the death of John W. Mitchell from certain notes and real estate constituted a return of capital to Adina Mitchell rather than income taxable to her. (Assignments of Error 6, 7.)

The Board of Tax Appeals erred in failing to decide that the income realized after the death of John W. Mitchell from certain notes and real estate was income taxable to his estate and not taxable to Adina Mitchell, his widow. (Assignment of Error 8.)

The Board of Tax Appeals erred in deciding that the principal of certain promissory notes constituted both corpus of the Estate of John W. Mitchell and income taxable to Adina Mitchell, his widow. (Assignments of Error 9, 10, 20.)

The Board of Tax Appeals erred in deciding that a Federal estate tax paid on the principal of certain promissory notes should not be set off against an income tax deficiency proposed against Adina Mitchell upon the same property. (Assignment of Error 11.)

The Board of Tax Appeals erred in failing to decide that the deficiencies proposed to be assessed against the estates of both John W. Mitchell and Adina

Mitchell are barred by the statute of limitations under the Revenue Acts of 1926 and 1928. (Assignment of Error 12.)

The Board of Tax Appeals erred in deciding that although Adina Mitchell reported all property here in question as owned by the estate of her deceased husband, John W. Mitchell, and paid a Federal estate tax thereon, penalties should be assessed against her for her failure to file a separate tax return reporting the same property as income of herself. (Assignments of Error 13, 14.)

The Board of Tax Appeals erred in deciding that an income tax may be collected against Adina Mitchell upon the same property reported as income of the Estate of John W. Mitchell, deceased. (Assignments of Error 2, 15, 18.)

The Board of Tax Appeals erred in deciding that the Government is entitled to three taxes upon the same property. (Assignment of Error 16.)

The Board of Tax Appeals erred in basing its decision upon certain computations shown by the stipulation of facts to be erroneous. (Assignment of Error 17.)

The Board of Tax Appeals erred in deciding that penalties may be assessed against petitioner as administrator for the failure of his decedent to file an income tax return. (Assignment of Error 19.)

The Board of Tax Appeals erred in determining deficiencies against the petitioner. (Assignment of Error 21.)

Los Angeles, California, was joint tenancy property rather than the individual property of the decedent, John W. Mitchell.

2. The Board of Tax Appeals erred in holding and deciding that the income from the real and personal property held in trust by the Title Guarantee and Trust Company of Los Angeles, California, was taxable to the decedent, Adina Mitchell, as surviving joint tenant for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

3. The Board of Tax Appeals erred in holding and deciding that the Declaration of Trust issued by the Title Guarantee and Trust Company of Los Angeles, California, on April 1, 1924, designated as No. 822-B was under the laws of the State of California sufficient to create a joint tenancy with right of survivorship.

4. The Board of Tax Appeals erred by failing to hold and decide that said Declaration of Trust issued by the Title Guarantee and Trust Company on April 1, 1924, was sufficient to create a joint tenancy with respect to the real and personal property held in trust by said Title Guarantee and Trust Company.

5. The Board of Tax Appeals erred in any event by failing to hold and decide that the said Declaration of Trust issued on April 1, 1924, was insufficient to create a joint tenancy with right of survivorship in the Hartwell and Los Angeles Stone Company notes which were definitely pledged with the said Trust Company to secure the individual indebtedness of the decedent, John W. Mitchell.

6. The Board of Tax Appeals erred in failing to hold and decide that the income from the real and personal property held in trust by the Title Guarantee and Trust Company constituted a return of capital to the decedent, Adina Mitchell, for the period July 2, 1925 to January 1, 1926, and the years 1926, 1927 and 1928, rather than income taxable to said decedent.

7. The Board of Tax Appeals erred by failing to hold and decide that the cost basis of the real estate sold after July 2, 1925, by the Title Guarantee and Trust Company was the fair market value thereof as of July 2, 1925, rather than March 1, 1913.

8. The Board of Tax Appeals erred by failing to hold and decide that the income from the real and personal property held in trust by the Title Guarantee and Trust Company was income taxable to the estate of John W. Mitchell, deceased, for the period from July 2, 1925 to January 1, 1926, and for the years 1926, 1927 and 1928.

9. The Board of Tax Appeals erred by failing to hold and decide that the Hartwell and Los Angeles Stone Company notes constituted a portion of the corpus of the estate of John W. Mitchell, deceased, and accordingly that payments thereon were not taxable as income to the decedent, Adina Mitchell, for the years 1925, 1926, 1927 and 1928.

10. The Board of Tax Appeals erred by, in effect, holding and deciding that the principal of the Hartwell and Los Angeles Stone Company notes constituted both corpus of the estate of John W. Mitchell, deceased, and taxable income to the decedent, Adina

Mitchell, when payments were made thereon during the years 1925, 1926, 1927 and 1928.

11. The Board of Tax Appeals in any event erred by holding and deciding that the Federal estate tax paid on the principal of the Hartwell and Los Angeles Stone Company notes by the estate of John W. Mitchell should not be set off against the income tax deficiency proposed against Adina Mitchell for the years here under review.

12. The Board of Tax Appeals erred in failing to hold and decide that the deficiencies proposed for assessment against the petitioner for all the taxable periods and years here involved were barred by the statute of limitations under the Revenue Acts of 1926 and 1928.

13. The Board of Tax Appeals erred in holding and deciding that penalties should be assessed against Adina Mitchell for her failure to file a separate individual income tax return for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

14. The Board of Tax Appeals erred by failing to hold and decide that inasmuch as the income here involved had been reported in the estate tax returns of the Estate of John W. Mitchell, deceased, filed by Adina Mitchell as executrix, no penalty should be assessed against Adina Mitchell individually for failure to report said income in the individual income tax return filed by her.

15. The Board of Tax Appeals erred by failing to hold and decide that the respondent erred in attempt-

ing to exact a second income tax from Adina Mitchell individually on income which had heretofore been reported by her as executrix of the estate of John W. Mitchell, deceased, and Federal income tax paid thereon.

16. The Board of Tax Appeals erred by, in effect, holding that the respondent could accept three separate taxes on the same property, that is, the Federal estate tax, on the theory that the real and personal property here involved was corpus of the estate of John W. Mitchell; an income tax paid by the estate of said John W. Mitchell, on the income from said property and a tax from Adina Mitchell individually on income reported by her as executrix in the Federal tax returns of the estate of John W. Mitchell.

17. The Board of Tax Appeals erred by failing to hold and decide that the March 1, 1913, value of the Santa Monica Beach property sold by John W. Mitchell prior to his death was $97,338.20 rather than $14,521.39. The March 1, 1913, value of said property was incorrectly stated in the stipulation of facts filed with the Board and the attention of the Board and respondent's representatives was called to the fact in the brief filed before the Board by petitioner on review.

18. The Board of Tax Appeals erred in holding and deciding that one-half of the income from the property held in trust by the Title Guarantee & Trust Company was taxable to the decedent, Adina Mitchell, for the period January 1, 1925 to July 2, 1925, under the theory that said property was held by John W.

Mitchell and his wife, Adina Mitchell, as joint tenants during said period.

19. The Board of Tax Appeals erred in any event by determining penalties against the petitioner as administrator of the estate of Adina Mitchell, deceased, inasmuch as any possible right of respondent to such penalties passed with the death of said Adina Mitchell.

20. The Board of Tax Appeals erred by failing to hold and decide that inasmuch as the respondent and petitioner had agreed that the real and personal property here involved constituted corpus of the Estate of John W. Mitchell, deceased, and the Board having reflected such agreement in a decision under Docket No. 36231, the question is *res adjudicata,* and the Commissioner is estopped from claiming that payments on the principal of said properties is taxable as income to the decedent, Adina Mitchell.

21. The Board of Tax Appeals erred in not redetermining the deficiencies herein involved in favor of the petitioner against the Commissioner.

STATUTES INVOLVED.

Revenue Act of 1926:

"Determination of Amount of Gain or Loss.

Sec. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided

in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

* * * * * * *

"Basis for Determining Gain or Loss, Depletion and Depreciation.

Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property.

* * * * * * *

"Gross Income Defied.

Sec. 213. For the purpose of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under

methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period."

Sections 111 and 113 of the Revenue Act of 1928 contain provisions similar to sections 202 and 204 of the Revenue Act of 1926. Section 22 of the Revenue Act of 1928 contains provisions similar to section 213 of the Revenue Act of 1926.

CALIFORNIA STATUTES INVOLVED.

Section 683 of the Civil Code of California enacted during the year 1872 provides:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

In 1929 section 683 of the Civil Code of California was amended by adding the language in italics:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy *or by transfer from a sole owner to himself and others or from tenants in common to themselves,* or to themselves and others, when expressly declared in the transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *No joint tenancy shall be created except as herein provided.*"

In 1931 the statute was again amended by dropping the language added in 1929 with the result that the section again stood in its original form.

In 1935 the provisions of the 1929 amendment were again restored.

STATEMENT OF FACTS.

Three separate cases involving the claims of the government for income taxes of John W. Mitchell and Adina Mitchell, his wife, both now deceased, are presented upon this appeal. They are:

Docket No. 47516.

Taxes claimed from John W. Mitchell for the year 1924 and for 1925 until July 2, the date of his death.

Docket No. 66584.

Taxes claimed from Adina Mitchell from July 2, 1925 (the date of Mr. Mitchell's death) to and including the year 1928.

Docket No. 70861.

Taxes claimed from Adina Mitchell for the year 1925 (to July 2 as a joint tenant; thereafter as a surviving joint tenant).

The controversy concerns taxes claimed to have accrued by reason of the sale by John W. Mitchell of three parcels of real estate, each of substantial value. These sales were made in 1921 and 1922. Mr. Mitchell died July 2, 1925. Mrs. Adina Mitchell, his widow, was appointed executrix of his will and proceeded with the administration of his estate. In the course of these

proceedings she made a Federal estate tax return in which she included all property in controversy as property of the estate of her deceased husband. Certain deductions were made by her under the claim that the property was community property of herself and her deceased husband and that only one-half was subject to tax. The Government resisted this claim and in a proceeding before the Board of Tax Appeals (Docket No. 36321) a deficiency was assessed (R. 163) and the tax paid.

Notwithstanding that the Government assessed and collected an estate tax on all of the property returned by Mrs. Mitchell as belonging to her husband and administered upon in his estate, it has assessed Mrs. Mitchell individually for taxes alleged to be due from her as a joint owner with her husband of this same property before his death, and as the sole owner of it thereafter as a surviving joint tenant. Thus the Government seeks to tax the same property twice.

The consolidated cases were tried before the Board of Tax Appeals upon a statement of facts (R. 52) which with its accompanying exhibits shows the various transactions concerning the real estate by which the tax liability is claimed to arise. The whole question hinges upon a so-called trust agreement (R. 102). The Government contends that this agreement created an estate in joint tenancy. Petitioner asserts that this agreement could not and did not create any estate in joint tenancy nor change the ownership of the property mentioned in it in any way, and that it is nothing more than a collateral agreement concerning the sale

by Mr. Mitchell of his property. To place the Court in the position of the parties at the time it was executed requires a brief statement of the events which preceded it.

Mr. and Mrs. Mitchell were married in 1888 and with the separate property of Mrs. Mitchell bought property which is called in these proceedings the Vermont property. In 1921 title to this property stood in the name of a bank to which it had been transferred as security for indebtedness of Mr. Mitchell. To satisfy this indebtedness Mr. Mitchell secured a loan from King C. Gillette which was evidenced by a note to Security Trust and Savings Bank. The property was then conveyed to Title Guarantee and Trust Company which executed a declaration of trust known as No. 750 (R. 59). This declaration of trust provided that the property might be sold in parcels, the net proceeds to be divided equally between Mr. Mitchell and Mr. Gillette (R. 61). The property was sold and all amounts paid by the trustee to the parties before the death of Mr. Mitchell.

In the following year title to two other parcels of property owned by Mr. Mitchell was transferred to Title Guarantee and Trust Company which executed its declaration of trust No. 822, dated December 14, 1922, naming John W. Mitchell as beneficiary (R. 66). The properties described in this instrument are known in these proceedings as the Santa Monica property and the Cahuenga property. Under the declaration of trust the trustee was to hold title to the property as security for the sum of $68,000.00 borrowed from

L. C. Brand (President of the trust company), by Mr. Mitchell, and, also for the purpose of selling it in whole or in part (R. 73). Upon payment of the amount loaned the assets of the trust were to be held by the trustee for the beneficiary, John W. Mitchell, his heirs or assigns (R. 75).

Another declaration of trust, known as No. 807 and dated December 11, 1922, three days prior to the execution of Declaration of Trust No. 822, deals with part of the same property (R. 80). This instrument recites that Title Guarantee and Trust Company has received title as trustee for the benefit of John W. Mitchell and others to a portion of the Santa Monica property described in Declaration No. 822. This declaration of trust recites that certain property had been sold to the Los Angeles Stone Company and others for a total consideration of $150,000.00, of which $25,000.00 was paid in cash and the balance evidenced by a note of the Los Angeles Stone Company to the order of John W. Mitchell for the sum of $125,000.00 payable in annual installments. The declaration further states its purposes as being (1) To secure the purchase price to the seller; (2) To permit the trustee, acting for the buyers, to subdivide the property (R. 86); (3) To allow the trustee to release portions of the property from the lien of the debt due Mr. Mitchell as evidenced by the promissory note upon the payment of a release price fixed at $100.00 per foot; and (4) to permit the trustee to sell the property or portions thereof and convey the same to purchasers "at such prices and upon such terms and conditions of sale as it may be so directed to do by the Buyers,

provided, however, that the said property shall not be sold at a price less than the Seller's release price * * *'' (R. 87). "All moneys paid to the Trustee for the credit of the Seller for release prices shall accumulate in the hands of the Trustee and be by it disbursed once a month on or before the fifteenth day of every calendar month and shall thereupon be disbursed to the Seller to apply upon the principal of his indebtedness * * *'' (R. 90).

It is perfectly clear that declaration of trust No. 807 was primarily for the benefit of Los Angeles Stone Co., et al., the buyers of certain property, and not Mr. Mitchell. The corporation had given its note for $125,000.00 payable in annual installments. The buyers planned to subdivide the property, sell it and pay the note in favor of Mr. Mitchell. The means for carrying out this plan was to have the trust company hold title for the benefit of Mr. Mitchell on the one hand and the sellers on the other so that when the sellers made a payment upon Mr. Mitchell's note, title to a portion of the property might be conveyed immediately, it being agreed that releases should be upon a schedule of $100.00 per front foot. In other words, the arrangement was simply a convenient form for the collection of the money due Mr. Mitchell as the buyers were able to pay it from the proceeds of property sold by them or otherwise. In effect it established an escrow through which title to real property might be transferred upon payment of the purchase price therefor.

In the year 1923 Mr. Mitchell authorized Title Guarantee and Trust Company to sell all of the Cahuenga

property. Title to this property was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345,000.00, of which $50,000.00 was paid in cash with a note for $295,000.00, secured by a deed of trust on the same property. The second deed conveyed a parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $90,000.00, secured by a deed of trust on the same 20 acres.

Each of these notes was made payable to John W. Mitchell (R. 54).

At the time these two notes and also the one made by Los Angeles Stone Co. were executed and delivered by the payees thereof, Mr. Mitchell deposited them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness then owing by him to it. Each of the three notes continued to be held by the trust company during the taxable period here in question (R. 55).

We come then to April 1, 1924, when Declaration of Trust No. 822-B (R. 102) upon which the Government bases its entire case was executed. At that date Title Guarantee and Trust Company held the real property originally conveyed to it, less that which had been sold by Mr. Mitchell in trust under the provisions of its Declaration No. 822 (R. 66). It held the two Hartwell notes and the Los Angeles Stone Company note, each payable to John W. Mitchell, as collateral security (R. 55). The indebtedness of Mr. Mitchell to L. C. Brand (President of Title Guarantee

and Trust Company) described in Declaration of Trust 807 had not been paid. The trust company had also loaned Mr. Mitchell money. Mr. and Mrs. Mitchell thereupon entered into the agreement with the trust company and Mr. Brand which is known as Declaration of Trust 822-B (R. 102).

The purpose of the agreement is perfectly clear. Mr. Mitchell very probably had made some promises to his wife that their property should be held by them in joint tenancy. He had entered into the transactions which have been described and which did not include Mrs. Mitchell as having any interest in the property or its proceeds. Undoubtedly Mr. Mitchell was entirely willing that his wife should be recognized by the trust company as being a joint tenant in the real property still held by it in trust. In the other hand the trust company and its president had loaned Mr. Mitchell a large amount of money without taking the community interest of Mrs. Mitchell into account to the extent of securing her signature. Very probably it insisted that Mr. Mitchell secure the consent of his wife to his hypothecation of the notes which had been given in consideration of the three sales of the real estate.

The agreement recites that the trust company, "at the request of John W. Mitchell and Adina Mitchell, his wife, declares that it holds the said Trusts and all assets thereof in Trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, with right of survivorship, subject to all the terms of any assignment or assignments heretofore made to secure

any indebtedness in favor of L. C. Brand, with additional provisions that the said Trusts shall also secure any indebtedness of the Title Guarantee and Trust Company * * *'' (R. 103). The instrument then continues, ''and further the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of property covered by said trusts'' (R. 103). This language relates to notes which the language clearly shows the parties did not regard as part of the ''assets'' of the trust which were mentioned in the first subject considered in the contract. By this provision Mrs. Mitchell transferred to the trust company any rights to the notes which she might have had as the wife of John W. Mitchell or otherwise.

The stipulation of facts (R. 55) and the Statements of the Commissioner of Internal Revenue which are the basis for these proceedings (R. 30, 49) show that all three of the notes were in the possession of Title Guarantee and Trust Company as collateral security from the time of their execution until after the death of Mr. Mitchell. During his lifetime payments made upon them were credited to his account on the books of the trust company and withdrawn by him from time to time. After his death payments continued to be made by the makers of these notes and these amounts were paid to Mrs. Mitchell as executrix. It is not contended by the Government that Mrs. Mitchell personally ever received a dollar of principal or interest on the notes.

In the Return for Federal estate tax filed by Mrs. Mitchell as Executrix of the Will of her husband she included the two Hartwell notes and the Los Angeles Stone Company note as assets of his estate (R. 120). She also returned the sum of $81,148.75 "cash in possession Title Guarantee and Trust Co. of Los Angeles, as trustee" (R. 120). This was the net proceeds of the sale by Title Guarantee and Trust Company after the death of Mr. Mitchell of a portion of the property held by it under Declaration of Trust 822 (R. 57).

Mrs. Mitchell as executrix also filed an income tax return for the decedent for the period January 1, to July 2, 1925 (the date of Mr. Mitchell's death) and, also as such executrix for subsequent income tax periods, to-wit: July 3, 1925 to December 31, 1925, and for the years 1926, 1927 and 1928 (R. 55).

Having assessed and received taxes upon the three promissory notes in question and the other property of Mr. Mitchell, the Government now seeks to go behind its own determination and assess Mrs. Mitchell for her asserted interest in the same property.

The stipulation of facts contains certain errors which were made through inadvertence. These were called to the attention of the Government immediately after the submission of the case to the Board of Tax Appeals. The errors are discussed in the record (R. 163-168) and are obviously the result of a mistake in computation. The Government should not hold petitioner to figures stated in the stipulation of facts which show on their face to be erroneous when it admits the correct figures to be those stated by the petitioner in the addenda submitted.

SUMMARY OF ARGUMENT.

I. The Declaration of Trust issued on April 2, 1924, by the Title Guarantee & Trust Company of Los Angeles, California, did not create a joint tenancy. Adina Mitchell was never a joint tenant of the real property with her husband and there are no Federal income taxes due and owing from her as a joint tenant.

II. The personal property consisting of the two Hartwell notes and the note of the Los Angeles Stone Company was not placed in joint tenancy by the Declaration of Trust dated April 1, 1924. The income from said personal property was not taxable to Adina Mitchell as a joint tenant.

III. Whether the notes and money were owned in joint tenancy or with the individual property of John W. Mitchell, deceased, they constituted corpus of his estate rather than income payable to Adina Mitchell.

IV. The respondent and the petitioner having agreed that the properties here involved constituted corpus of the estate of John W. Mitchell, deceased, and the Board of Tax Appeals under Docket No. 36231 having rendered its decision based thereon the question is *res adjudicata* and the Commissioner is estopped from claiming the payments on the principal of these properties is taxable as income to the decedent.

V. The three promissory notes and the proceeds on the sale of property made after Mr. Mitchell's death cannot be taxed both as corpus of his estate and also as income to Mrs. Mitchell.

VI. If Adina Mitchell is liable for income tax, the amount of estate tax assessed and paid against the same property should be allowed as an offset.

VII. There is no basis for assessing a penalty against a widow under the circumstances shown in this case.

ARGUMENT.

I.

THE DECLARATION OF TRUST ISSUED ON APRIL 2, 1924, BY THE TITLE GUARANTEE AND TRUST COMPANY OF LOS ANGELES, CALIFORNIA, DID NOT CREATE A JOINT TENANCY. ADINA MITCHELL WAS NEVER A JOINT TENANT OF THE REAL PROPERTY WITH HER HUSBAND AND THERE ARE NO FEDERAL INCOME TAXES DUE AND OWING FROM HER AS A JOINT TENANT.

The Government bases its claims solely upon the agreement known as Declaration of Trust No. 822-B (R. 102). However, this instrument contains no appropriate words of transfer to create a joint tenancy or other estate in real property. The trust company declares that it holds the trusts and all assets thereof in trust for John W. Mitchell and Adina Mitchell as joint tenants. But such a statement falls far short of what is necessary to create an estate in joint tenancy, an estate which has come down to us from the common law and which has particular requirements for its creation.

Joint tenancy was an estate at common law, which is defined by Blackstone as follows:

> "The properties of a joint estate are derived from its unity, which is fourfold; the unity of

interest, the unity of title, the unity of time, and the unity of possession; or in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. First, they must have one and the same interest * * * Secondly, joint tenants must also have an unity of title; their estate must be created by one and the same grant, or by one and the same disseisin * * * Thirdly, there must also be an unity of time; their estates must be vested at one and the same period, as well as by one and the same title."

Cooley's Blackstone, Third Edition, Sec. 181.

The modern definition of joint tenancy is exactly the same. Corpus Juris states the rule as follows:

"In order to have a joint tenancy, there must exist four unities: (1) Unity of interest. (2) Unity of title. (3) Unity of time. (4) Unity of possession. That is, each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time, except in cases of uses and executory devises; * * *"

33 *Corpus Juris* 907.

All of the standard texts on the law of real property state the same rule. The following is typical:

"It is requisite to the existence of an estate in joint tenancy (a) that the tenants must have one and the same interest, (b) that the interest must accrue by one and the same conveyance, (c) the interest must commence at one and the same time, and (d) it must be held by one and the same un-

> divided possession * * * Unity of title requires that the joint estate shall arise by one and the same act, or by one and the same deed, one and the same devise, or one and the same disseisin. Joint tenants can not acquire under different titles."
>
> *Thompson on Real Property*, Vol. 2, p. 926, Sec. 1711.

Disseisin at common law was, of course, the lowest and most imperfect form of title, resting upon the mere naked possession, or actual occupation of the estate, without any apparent right to hold and continue such possession.

The estate of joint tenancy has been expressly recognized in California by Section 683 of the Civil Code, first enacted in 1872, which until 1929 read as follows:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

That each one of the four unities must be present for the creation of an estate in joint tenancy in California under that statute is evident from the case of *Siberell v. Siberell,* 214 Cal. 767, where the Supreme Court held that in this state "husband and wife may take, hold and enjoy real property either as joint tenants, tenants in common or as common or community property." After quoting the statutory definitions of these various estates the Court said:

"From these statutory provisions it is clear that in California we have a modified form of certain estates known to the common law and have them operating alongside of the community property system, an importation from the Spanish law. Naturally, therefore, at times there will appear to be difficulty in harmonizing these systems. But our statutes have been amended from time to time, so altering the original provisions of each of the systems as to allow them both a place in our jurisprudence.

"Respecting joint tenancy, it is only necessary to amplify the definition quoted from section 683 by a quotation from the case of DeWitt v. San Francisco, 2 Cal. 289, 297, opinion rendered in 1852, defining joint tenancy as follows: 'Joint tenancy is a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely, unity of interest, unity of title, unity of time, unity of possession. 1 Cruise's Digest (by Greenleaf), 355, sec. 11. 2 Crabb's Real Prop. sec. 2303. But the distinguishing incident is a right of survivorship. 1 Cruise, 359, sec. 27. 2 Crabb's Real Prop. sec. 2306.' These four characteristics are the acknowledged elements of a joint tenancy. (1 Tiffany on Real Property, 2d ed. p. 625, par. 191; 2 Blackstone's Commentaries 180.) It is at once evident that there is thereby created but one estate and that each of the four elements, unity of interest, unity of title, unity of time and unity of possession, must be present and an absence of any one would change the nature of the estate.

"Applying the first of these elements, unity of interest, to the situation of a wife holding half the property as her separate estate and the husband holding the other half as community property, it will be at once noted that there can be no unity of interest present, for the interest of the wife would be unequal to and more than that of the husband. This follows because the wife has always had at least a limited interest in the community property (Stewart v. Stewart, 199 Cal. 318, 249 Pac. 197). In 1891 her rights were enlarged to require her written consent to gifts and voluntary transfers of it. In 1917 again her rights were enlarged to allow a division of the common property under certain conditions without a dissolution of the marriage ties, also requiring her signature to convey or encumber it. Again in 1923, sections 1401 and 1402 of the Civil Code were amended to give her equal testamentary power with the husband over it and in the absence of a will by the husband, she, to the exclusion of the children, takes the whole of it. Lastly, in 1927, section 161a was added to the Civil Code investing her with full title to one-half thereof, ceding alone to the husband the management and control thereof."

Under the reasoning of this case there was no joint tenancy created by the instrument executed by Mr. and Mrs. Mitchell for the reason that the four unities were not present. It has been stipulated that Mrs. Mitchell contributed the original purchase price of the property which Mr. Mitchell purchased, and the later additions to his holdings were, under the record in this case, either community property or her separate prop-

erty. Each spouse, therefore, had an interest in the property in dispute long before the agreement under consideration was made. Under such circumstances it seems elementary that they could not, by their joint act, create an estate in joint tenancy in the very property they had theretofore owned by a different title. The Supreme Court in the *Siberell* case said

> "that each of the four elements, unity of interest, unity of title, unity of time and unity of possession, must be present and an absence of any one would change the nature of the estate."

The leading cases in the United States on the creation of an estate in joint tenancy by a conveyance of property by one spouse to himself or herself and the other spouse are *Breitenbach v. Schoen,* a Wisconsin case, and *Deslauries v. Senesac,* decided by the Supreme Court of Illinois.

In the case of *Breitenbach v. Schoen* (Wis. 1924), 198 N. W. 622, one Anna Schoen prior to her death was the owner of certain certificates of stock which she endorsed as follows:

> "For value received, I hereby sell, transfer and assign to Anna Marie Schoen or Peter Schoen, her son, or survivor, the shares of stock within mentioned, and hereby authorize the officers to make the necessary transfer on the books of the corporation."

It was contended that she thereby created an estate in joint tenancy in the certificates in favor of herself and her son. The Supreme Court held that no estate in joint tenancy had thereby been created, stating:

"It is conceded that a joint tenancy may be created in personal property. It is contended that there must be the characteristic unities, namely, unity of time, title, interest and possession. Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664.

It is claimed that under the undisputed facts in this case the deceased could not, by assigning the certificates to herself, create a joint tenancy, because her interest and the interest of the defendants were not created by the same act, nor did the interest of the deceased and the defendant vest at one and the same time. Joint tenancies are no longer favored in the law as they once were. Changes in the law of tenures have to a considerable extent abolished the reasons for the existence of joint tenancies. Courts of law now incline against them. Martin v. Smith, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; 33 C. J. 905, par. 6, and cases cited.

Manifestly, the deceased could not convey an interest in the certificates to herself, and it is quite clear that she did not intend to convey the entire interest in the certificates assigned. Wright et al. v. Knapp, 183 Mich. 656, 150 N. W. 315; Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617, 33 L. R. A. (N. S.) 166, Ann. Cas. 1912(c) 925, and cases cited."

The same conclusion was reached in the case of *Deslauries v. Senesac,* 331 Ill. 437, 163 N. E. 327. In that case a woman acquired title to a lot before marriage and after marriage she and her husband executed a deed purporting to convey the property to themselves as joint tenants and not as tenants in common. The description was followed by the statement:

"Said grantors intend and declare that their title shall and does hereby pass to grantees not in tenancy in common but in joint tenancy."

In holding that this deed did not create an estate in joint tenancy the Court said:

"A transaction involving the transfer of title to real estate presupposes the participation of two or more parties. For every alienation there must be an alienor and an alienee, for every grant a grantor and a grantee, and for every gift a donor and a donee. The words 'convey', 'transfer', and similar words employed in conveyancing, signify the passing of title from one person to another. To make a deed effective, the grantor is divested of, and the grantee is vested with, the title. The requisites of a deed purporting to grant an immediate estate in possession are that there be a grantor, a grantee, and a thing granted. Duffield v. Duffield, 268 Ill. 29, 108 N. E. 673, Ann. Cas. 1916D, 859. A person cannot convey or deliver to himself that which he already possesses. Breitenbach v. Schoen, 183 Wis. 589, 198 N. W. 622; Cameron v. Steves, 4 Allen (N. B.), 141; Perkins on Conveyancing (15th Ed.) p. 42; 13 Cyc. 527. He cannot by deed convey an estate to himself or take an estate from himself. Cameron v. Steves, supra. At common law livery of seizin was necessary to pass the title to real property, and it was recognized that a person could not make livery of seizin to himself. Perkins on Conveyancing (15th Ed.), p. 42. By section 1 of the Conveyance Act (Smith-Hurd Rev. St. 1927, c. 30) livery of seizin has been rendered unnecessary, but the muniment of title, namely the deed, must still be delivered. Devlin on Real Estate and Deeds (3d Ed.) No. 260a, 261.

An estate in joint tenancy can only be created by grant or purchase—that is, by the act of the parties. It cannot arise by descent or act of law. The properties of a joint estate are derived from its unity, which is fourfold, the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 1 Sharswood's Blackstone's Com. book 2, p. 180; Freeman on Cotenancy and Partition (2d Ed.) No. 11; 1 Washburn on Real Prop. (6th Ed.) No. 855; 7 R. C. L. p. 811; Gaunt v. Stevens, 241 Ill. 542, 89 N. E. 812.

Ida Deslauries was the sole owner of the half lot prior to the execution of the deed from herself and husband to themselves. She could not by that deed convey an interest in the property to herself. It is manifest from the deed that she did not intend to convey the whole and entire interest to her husband, for she retained an equal share or interest. Hence the interests of Ida Deslauries and her husband were neither acquired by one and the same conveyance, nor did they vest at one and the same time. Two of the essential properties of a joint estate—the unity of title and the unity of time—were therefore lacking. Where two or more persons acquire individual interests in a parcel of property by different conveyances and at different times, there is neither unity of title nor unity of time, and in such a situation a tenancy in common, and not a joint tenancy, is created. Breitenbach v. Schoen, supra; Green v. Cannady, 77 S. C. 193, 57 S. E. 832; 7 R. C. L. p. 811."

Deslauries v. Senesac, 163 N. E. 327, 328 (331 Ill. 437).

This case was later followed in *Crow v. Crow,* 348 Ill. 241, 180 N. E. 877, 880, where the Court considered the effect of a conveyance made by a man to himself and his wife. The Court said:

> "Admittedly the Crows could not by a deed to themselves vest themselves with an estate in joint tenancy."

That this is the construction placed upon Section 683 C. C. by the California legislature must be apparent when the history of the statute is considered. Up to 1929 the statute read as above quoted. In that year it was amended by adding the language italicized:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy *or by transfer from a sole owner to himself and others or from tenants in common to themselves, or to themselves and others,* when expressly declared in the transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *No joint tenancy shall be created except as herein provided."*

In 1931 the statute was again amended dropping the language added in 1929 so that the section again stood in its original form. In 1935 the provisions of the 1929 amendment were restored.

It must be presumed that the legislature had some purpose in making the changes in this statute through the years. Certainly if a joint tenancy could have been created by a "transfer from a sole owner to himself and others or from tenants in common to them-

selves, or to themselves and others'' under the original statute, no change was necessary. Obviously the statute was amended to allow a joint tenancy to be created in a manner different from that required by the California law up to 1929.

In the instant case we have an agreement executed at the time the original statute was in effect and five years before it was first amended. That agreement must of course be construed in accordance with the provisions of Sec. 683 Civil Code as it read at that time. As so construed it seems perfectly clear that no estate in joint tenancy was ever created by the so-called declaration of trust 822-B.

II.

THE PERSONAL PROPERTY CONSISTING OF THE TWO HARTWELL NOTES AND THE NOTE OF THE LOS ANGELES STONE COMPANY WAS NOT PLACED IN JOINT TENANCY BY THE DECLARATION OF TRUST DATED APRIL 1, 1924. THE INCOME FROM SAID PERSONAL PROPERTY WAS NOT TAXABLE TO ADINA MITCHELL AS A JOINT TENANT.

The Declaration of Trust dated April 1, 1924, states in part as follows (R. 103):

> ''* * * and further, the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, * * *''

These words relate to the two Hartwell notes and the note of the Los Angeles Stone Company, which, the language of the instrument clearly shows, the par-

ties did not regard as part of the assets of the trust which were mentioned in the first subject considered in the contract.

By the above quoted provision Mrs. Mitchell transferred to the Trust Company any right to the notes which she might have had as the wife of John W. Mitchell or otherwise.

The stipulation of facts (R. 55) and the statements of the Commissioner of Internal Revenue which are the basis for these proceedings (R. 30, 49) show that all three notes were held by the Title Guarantee and Trust Company as collateral security from the time of their execution until after the death of Mr. Mitchell. During the lifetime of Mr. Mitchell payments made upon the notes were credited to his account on the books of the Trust Company and withdrawn by him from time to time. After his death payments continued to be made by the makers of these notes and these payments were made to Mrs. Mitchell as executrix.

The respondent does not contend that Mrs. Mitchell personally received a dollar of principal or interest on these notes. All payments were made to her as executrix. Accordingly, under the clear and unambiguous language of the Declaration of Trust dated April 21, 1924, the personal property consisting of the Hartwell and Los Angeles Stone Company notes was pledged as security for the personal debts of John W. Mitchell and was not placed in joint tenancy by the Declaration of Trust. This is further shown by action of the Trust Company in crediting the payments to

John W. Mitchell's account during his lifetime and after his death by crediting the payments to his wife as executrix.

Furthermore, as brought out under point I of this brief, the instrument was not sufficient to create a joint tenancy either in the real or personal property. Accordingly any payments on either the principal or the interest on said notes did not constitute taxable income to Adina Mitchell.

III.

WHETHER THE NOTES AND MONEYS WERE OWNED IN JOINT TENANCY OR WERE THE INDIVIDUAL PROPERTY OF JOHN W. MITCHELL, DECEASED, THEY CONSTITUTED CORPUS OF HIS ESTATE RATHER THAN INCOME PAYABLE TO ADINA MITCHELL.

In the case of *Gwinn v. Commissioner of Internal Revenue,* 287 U. S. 224, 77 L. Ed. 270, the Supreme Court held that the provisions of the Revenue Act of 1924 require the inclusion as corpus of the estate of a deceased resident of California of property held in joint tenancy. In that case, the Court considered *Re Gurnsey,* 177 Cal. 211, 170 Pac. 402, which held that the California inheritance tax law of 1911 "did not undertake to impose a tax upon the rights accruing to a surviving joint tenant upon the death of his cotenant." In holding that property held in joint tenancy must be returned as part of the corpus of an estate for federal tax purposes, the Court held:

> "Although the property here involved was held under a joint tenancy with the right of survivor-

> ship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution. Cal. Code Civ. Proc., sec. 752; Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Hilborn v. Soale, 44 Cal. App. 115, 185 Pac. 982. The right to effect these changes in the estate was not terminated until the co-tenant's death. Cessation of this power after enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights."

In the case of *Melczer v. Commissioner,* 23 B. T. A. 124, 129, the Board of Tax Appeals also held that property in California held by husband and wife in joint tenancy constitutes corpus of the estate of the deceased joint tenant. The Board refused to follow *Carter v. English,* 15 Fed. (2nd) 6, which held that no part of property held by joint tenancy should be included in the gross estate of a deceased joint tenant under the Revenue Act of 1916, and said:

> "We do not agree with this view of the attributes of an estate in joint tenancy (see United States v. Robertson, 183 Fed. 711; and Knox v. McElligott, 258 U. S. 546), but in any event we do not consider Carter v. English, supra, controlling in the instant proceeding, since we are concerned here with subsections (e) and (h) of section 302 of the Revenue Act of 1924 which by their terms expressly require the inclusion in the gross estate

of a decedent of the full value of property held by such decedent and any other person as joint tenants, *regardless of when such tenancy was created.* The Revenue Act of 1916 had no such retroactive provision. Mary Allen Emery, Executrix, 21 B. T. A. 1038, is, in like manner, distinguishable from the instant proceeding. We held in Rita O'Shaughnessy, 21 B. T. A. 1046, that since it did not clearly appear that section 302(e) and (h), Act of 1924, was unconstitutional, we were constrained to follow it and to hold that the entire value of the property held by the decedent and his wife as joint tenants should be included in the gross estate regardless of when the tenancies were created. We therefore hold that the full value of the property held in joint tenancy by the decedent and his wife in the instant proceeding should be included in the gross estate. See also J. H. Gwinn, 20 B. T. A. 1052.

Even if we should adopt the view of the court as set forth in Carter v. English, supra, as to a joint tenancy, the full value of the property so held would have to be included in the gross estate of the decedent, since the case would then fall within the rule laid down in Tyler v. United States, 281 U. S. 497, with regard to tenancies by the entirety."

IV.

THE RESPONDENT AND THE PETITIONER HAVING AGREED THAT THE PROPERTIES HERE INVOLVED CONSTITUTED CORPUS OF THE ESTATE OF JOHN W. MITCHELL, DECEASED, AND THE BOARD OF TAX APPEALS UNDER DOCKET NO. 36231 HAVING RENDERED ITS DECISION BASED THEREON, THE QUESTION IS RES JUDICATA, AND THE COMMISSION IS ESTOPPED FROM CLAIMING THAT PAYMENTS ON THE PRINCIPAL OF THOSE PROPERTIES IS TAXABLE AS INCOME TO THE DECEDENT.

The general rule which bars the right of the Government to now proceed against Mrs. Mitchell for income taxes is as follows:

> "Except as to actions of ejectment in some jurisdictions, the modern rule as to the conclusiveness of adjudications respecting title is the same as in case of any other matter which has become res judicata, and no distinction is made in this respect between real and personal property. With the exception noted it may therefore be laid down as a general rule that whatever the form or nature of the action, whenever title or ownership of property comes directly in issue and is litigated to a judgment, such judgment is conclusive upon the same issue whenever it arises in subsequent litigation between the same persons or their privies, even though the cause of action be different or though other or additional property or interests be also involved in the second action." (*Freeman on Judgments* (Fifth Edition), Vol. 2, Sec. 855, p. 1809.)

In the leading case of *Cromwell v. County of Sacramento,* 94 U. S. 351, 24 L. Ed. 195, the Court discussed this rule and said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel,

that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The question actually litigated and determined in the action brought by the respondent to enforce a tax deficiency from the Estate of John W. Mitchell concerned the property which was owned by Mr. Mitchell at the date of his death. An analogous situation is presented in the recent case of *Tait v. Western Maryland R. Co.,* 289 U. S. 620; 77 L. Ed. 1405, where the Court said on this subject:

> "1. The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. Cromwell v. Sac. County, 94 U. S. 351-353, 24 L. Ed. 195-198; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed.

355, 376, 18 S. Ct. 18; United States v. Moser, 266 U. S. 236, 241, 69 L. ed. 262, 264, 45 S. Ct. 66. Since the claim in the first suit concerned taxes for 1918 and 1919 and the demands in the present actions embraced taxes for 1920-1925, the case at bar falls within the second class. The courts below held the lawfulness of the respondent's deduction of amortized discount on the bonds of the predecessor companies was adjudicated in the earlier suit. The petitioner, admitting the question was in issue and decided in respect of the bonds issued by the second company, and denying, for reasons presently to be stated, that this is true as to the bonds of the first company, contends that as to both the decision of the Court of Appeals is erroneous, for the reason that the thing adjudged in a suit for one year's tax cannot affect the rights of the parties in an action for taxes of another year.

As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.

This court has repeatedly applied the doctrine of res judicata in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 S. Ct. 905; Third Nat. Bank v. Stone, 174 U. S. 432, 43 L. ed. 1035, 19 S. Ct. 759; Baldwin v. Maryland, 179 U. S. 220, 45 L.

ed. 160, 21 S. Ct. 105; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 S. Ct. 154. Compare United States v. Stone & D. Co., 274 U. S. 225, 230, 231, 71 L. ed. 1013, 1024, 1025, 47 S. Ct. 616. The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than the courts. New Orleans v. Citizens' Bank, 167 U. S. 398, 399, 42 L. ed. 211, 212, 17 S. Ct. 905. It cannot be supposed that Congress was oblivious of the scope of the doctrine, and in the absence of a clear declaration of such purpose, we will not infer from the annual nature of the exaction an intent to abolish the rule in this class of cases."

In another recent case it has been held:

"The doctrine of res adjudicata applies to a case arising under the internal revenue laws as well as to any other civil action. Old Colony Trust Company v. Commissioner, 279 U. S. 716, 49 S. Ct. 499, 73 L. Ed. 918; Greylock Mills v. White, Collector (D. C.), 55 F. (2d) 704. Nor does the fact that the first suit was against the United States, and the case at bar against the collector of internal revenue, avoid the bar of res adjudicata. Second National Bank of Saginaw v. Woodworth, supra."

Bertelsen v. White, 58 F. (2nd) 792, 795.

That the present dispute concerns the same parties and the same subject matter as the estate tax proceeding before the Board of Tax Appeals is also apparent. In a very early case arising in California this Court held:

"Under the statutes of California real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of administration and debts of the deceased, and then the residue after satisfying all lawful claims distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator * * *

He represents the title. If the administrator sues, or is sued, and fails when the title is in issue and determined, the judgment is binding both upon the heirs and the creditors of the estate. The matters thus adjudged would afterwards be res adjudicata between the opposing party in the action and the heirs, as well as the administrator."

Meeks v. Vassault, 3 Sawy. 206 (affirmed in 100 U. S. 564).

The case of *Second Nat. Bank of Saginaw v. Woodworth,* 54 Fed. (2nd) 672, is particularly significant in connection with the situation in the instant case:

"Wellington R. Burt, a citizen of Michigan residing in Saginaw, in this district, died on March 2d, 1919. The plaintiff was made executor under the will on August 13, 1920, and continued as executor until May 24, 1922, on which date it was discharged as executor of the estate and appointed testamentary trustee, in which capacity it has ever since acted, and is still acting. On August 14, 1920, the executor filed a federal estate tax return for the decedent, and the tax shown

thereon was assessed and paid. Thereafter the Commissioner assessed an additional tax in the amount of $662,625.89, which resulted from increasing the net value of the estate subject to taxation by adding thereto various gifts of bonds, stocks, and other property made by the deceased to his son and daughters in 1915, some four years prior to his death. The plaintiff under date of June 21, 1923, filed a claim for refund, and, while the claim was receiving consideration by the Commissioner of Internal Revenue, filed a suit in the Court of Claims, which suit set forth, among others, the identical grounds upon which this case is predicated. On January 26, 1926, while the case was pending in the Court of Claims, the plaintiff and the Commissioner of Internal Revenue executed, and the Secretary of the Treasury approved, an agreement whereby a determination was made as to the amount of tax liability. The determination was accepted by the plaintiff, and resulted in a refund to it of $249,220.14. Thereafter, on July 21, 1926, counsel for plaintiff filed a motion in the Court of Claims for dismissal of the suit there pending, which motion recited that the claim for refund sued upon had been reopened by the Commissioner of Internal Revenue, allowed in part, and the amount of the allowance paid to the plaintiff, and that the parties had entered into an agreement in accordance with section 1106(b), of the Revenue Act of 1926 (26 USCA sec. 1249 note), and consenting to the final determination and assessment of the estate tax, whereupon the Court of Claims entered an order dismissing the cause as of October 18, 1926. Thereafter the plaintiff, as testamentary trustee of the decedent's estate, filed with the probate court for the county of Saginaw a petition reciting the action and pro-

ceeding it had taken with respect to the claim of the estate for the refund.

The probate court entered an order on the said petition stating that the trustee's action had been taken without power or authority, and without the sanction or knowledge of the court. The order expressly rejected the attempted settlement, and directed the trustee to take all necessary steps to recover the total amount of tax imposed upon the said gifts, and to report its actions and doings to the court. In compliance with this order, the plaintiff on June 4, 1927, filed a claim for refund in the sum of $256,888.61, which was rejected by the Commissioner of Internal Revenue on the ground that the agreement previously entered into had settled all questions between the parties. On April 6, 1928, without first tendering back to the government the amount refunded, a second petition was filed in the Court of Claims by the plaintiff, based upon the rejection of the claim for refund, and upon demurrer to the petition the court held that the claim set up therein was res adjudicata. The demurrer was sustained, and the petition dismissed. Plaintiff thereafter applied to the Supreme Court of the United States for a writ of certiorari, which was denied, whereupon, on October 2d, 1929, the plaintiff instituted the instant action against Fred L. Woodworth, collector of internal revenue, to which, under the plea of general issue, special defenses were interposed by the defendant, including the defense of res adjudicata."

The Court held that the dismissal by the plaintiff of the second action brought in the Court of Claims barred his recovery.

Certainly the Government should not be able to subject a citizen to continued litigation in different actions upon the same subject matter. The Court of Claims succinctly stated the rule as follows:

> "For these reasons we are of the opinion that when the government voluntarily goes into a court of justice as a plaintiff, its litigation, like that of other suitors, is subject to the general principle that there must be an end of litigation, and that the defendant, whom it impleads against his will and subjects to the risks and costs of litigation, may subsequently invoke, like other defendants, the maxim *Nemo debet bis vexari pro una eadem causa.*"
>
> *Fendall v. U. S.*, 14 C. of C. 247, 252.

V.

THE THREE PROMISSORY NOTES AND THE PROCEEDS OF THE SALE OF PROPERTY MADE AFTER MR. MITCHELL'S DEATH CANNOT BE TAXED BOTH AS CORPUS OF HIS ESTATE AND ALSO AS INCOME OF MRS. MITCHELL.

The stipulated facts in the case show that the three notes which form the basis of the controversy were included in their entirety as corpus of the estate of John W. Mitchell in the Federal Estate Tax return made by the widow and the tax paid thereon. The inclusion of the principal of these notes in the estate tax return was approved by respondent. As a matter of fact respondent proposed a deficiency in the estate tax of John W. Mitchell, deceased; the deficiency was finally stipulated to be $2,589.55, and the Board en-

tered an order finally determining said sum as deficiency in estate tax due from Estate of John W. Mitchell (R. 163).

Likewise, there was reported in the Federal Estate Tax Return of John W. Mitchell, deceased, the sum of $81,148.75, the net proceeds of a sale by Title Guarantee and Trust Company as trustee for John W. Mitchell of Santa Monica real estate. This amount was entered in the estate tax return as cash on hand (R. 120). It was accepted by the Commissioner as corpus of the estate and Federal estate tax paid thereon.

In the instant proceeding, the respondent attempts to tax payments made on the principal of the said notes as income to Adina Mitchell (now deceased) for the years 1925, 1926, 1927 and 1928. Also the Commissioner would treat as taxable income to Adina Mitchell, large sums of money which he has already agreed are corpus of the estate of John W. Mitchell, deceased, and upon which the Government has long since collected estate tax.

Under the recent decision of the Supreme Court of the United States in *Bull v. The United States,* 295 U. S. 247, 79 L. Ed. 1421, the above items cannot be corpus of the estate of John W. Mitchell, deceased, and also income to Adina Mitchell. In that case the Court said:

> "The petitioner included in his estate tax return, as the value of Bull's interest in the partnership, only $24,124.20, the profits accrued prior to his death. The Commissioner added $212,718.79, the sum received as profits after Bull's death, and

> determined the total represented the value of the interest. The petitioner acquiesced and paid the tax assessed in full in August, 1921. He had no reason to assume the Commissioner would adjudge the $212,718.79 income and taxable as such. Nor was this done until July, 1925. *The petitioner thereupon asserted, as we think correctly, that the item could not be both corpus and income of the estate"* (italics supplied).

The instant proceeding presents even a stronger set of facts for the petitioner than *Bull v. United States,* supra. Here we have involved not partnership profits but actual securities, promissory notes and a sum of money included in the estate and taxed as corpus. Nevertheless, the payments on the principal of the notes and a portion of the money have been treated by the respondent as income to Adina Mitchell individually although the notes and the money were actually determined by respondent and the Board of Tax Appeals to be corpus of the estate of John W. Mitchell.

VI.

IF ADINA MITCHELL IS LIABLE FOR INCOME TAX, THE AMOUNT OF ESTATE TAX ASSESSED AND PAID AGAINST THE SAME PROPERTY SHOULD BE ALLOWED AS AN OFFSET.

In the case of *Bull v. United States,* 295 U. S. 247, 79 L. Ed. 1421, the Court considered a situation where the same property was claimed to be subject to an income tax after having been returned as corpus of a decedent's estate. When filing an estate tax return,

the executor included the decedent's interest in a partnership at a value which represented the decedent's share of the earnings accrued to the date of death. The commissioner valued such interest at a greatly increased amount, including profits accruing to the estate after the decedent's death. The increased value was subjected to the payment of an estate tax which was paid.

Thereafter, the executor of the estate filed an income tax return for the estate of the decedent which return did not include as income the amount which had been added by the commissioner to the value of the partnership as income accruing after the decedent's death. The commissioner determined that this amount should have been returned by the executor as income of the estate and notified plaintiff of a deficiency. No deduction was allowed by the commissioner on account of the value of the decedent's interest in the partnership at his death which had been subjected to the federal estate tax. The deficiency income tax was paid and the executor filed a claim for refund, which was rejected. Thereafter, he filed suit in the Court of Claims from which a writ of certiorari was granted by the Supreme Court.

In holding that the taxpayer was entitled to recover, the Court said:

> "In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the

period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress.

In July, 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim was for income tax. The taxpayer opposed payment in full, he demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party hold his money which has gone into its treasury by means of the fraud of their agent. United States v. State Nat. Bank, 96 U. S. 30, 24 L. ed. 647. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Nat. Bank Case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial * * * In these cases (cited in the opinion) and many others that might be cited, the rules of law applicable to individuals were applied to the United States' (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. United

States v. Macdaniel, 7 Pet. 1, 16, 17, 8 L. ed. 587, 592, 593; United States v. Ringgold, 8 Pet. 150, 163, 164, 8 L. ed. 899, 903, 904. In the latter case this language was used: 'No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such a claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.' If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second case, owing to the

summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score.

To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax."

Under this authority if any income tax is due from Adina Mitchell, she is entitled to have offset against this amount the estate tax assessed and paid.

VII.

THERE IS NO BASIS FOR ASSESSING A PENALTY AGAINST A WIDOW UNDER THE CIRCUMSTANCES SHOWN IN THIS CASE.

This is not a case in which a taxpayer attempted to avoid the payment of taxes. Mrs. Mitchell as executrix of the will of her husband made a return of all of the property as corpus of the estate of her husband, and also filed a return in proper form showing income for each of the taxable periods in controversy. In these returns she included income from all of the notes and

properties mentioned, thereby disclosing in detail every item of income upon which a tax might be assessed. Therefore, the assessment of a penalty could only be made against her by reason of a possible error of judgment and could not be based upon failure to disclose or fraud.

We know of no precedent upon which a penal judgment could be rendered against a widow who in good faith gave the Government all information concerning the property in question in the honest belief that it was part of her husband's estate which she was administering under his will.

CONCLUSION.

From the foregoing it appears that the notes were the individual properties of John W. Mitchell before his death; that they were properly included as part of the corpus of his estate in the return filed after his death; and that payments on the principal of the notes did not constitute taxable income to Adina Mitchell. The same is true of the $81,148.75 included in the Estate Tax Return of John W. Mitchell as cash on hand. The Government has taxed all of this property as corpus of Mr. Mitchell's estate. It now seeks to tax the same items as income to Mrs. Mitchell.

Such a position on the part of the Government violates every principle of good faith and fair dealing. To maintain it is to say that the Government may pursue an estate and collect taxes upon all of the property returned as belonging to the deceased and immediately thereafter charge his widow with taxes

on the same property, and penalties also, for failing to disclose an interest which she never asserted as against her husband's estate. The record here conclusively shows that Mrs. Mitchell did everything which was required of her and has paid taxes upon the entire property again sought to be charged with taxes.

Petitioner contends that the judgment of the Board of Tax Appeals should be reversed and that this Court should hold that the notes and monies here involved were not income to Adina Mitchell but corpus of the Estate of John W. Mitchell, deceased. In the alternative, if the Court should determine that the notes and monies were income to Adina Mitchell, then Adina Mitchell is entitled to have the judgment against her reduced by the Estate Tax paid on the notes and monies included in the Estate Tax Return as corpus of the Estate of John W. Mitchell, and without penalty.

Dated, Los Angeles, California,
September 21, 1936.

Respectfully submitted,
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